Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1995

UNITED STATES OF AMERICA
EX. REL. DILIP K. PAUL,
Petitioners,

v.

U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION and PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., PB-KBB, INC. and BATTELLE MEMORIAL INSTITUTE,
Respondents.

Petition For A Writ Of Certiorari
The United States Court Of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can the state courts have concurrent jurisdiction, along with the U.S. courts, over a case arising from the False Claims act, when the *Article 1, Sections 8 and 9 provides exclusive rights to the Congressional Actions and Section 10 of the U.S. Constitution* made such powers exclusive by virtue of express provisions prohibiting any state action?

    a. Whether Harris County District Court, Texas, has concurrent jurisdiction along with U.S. District Courts for claims arising under 31 U.S.C. §3730(b) and (h), when the *qui tam* plaintiff, in its opening pleading, sets up a right under the said law as a ground for recovery for the U.S. and for himself?

2. Whether Harris County District Court has in personam jurisdiction over undocumented Canadian domicileds, and over people domiciled in Germany, to pass judgment on a case rising under the False Claims Act?

3. Whether Harris County District Court has the authority to try a case arising under the False Claims Act, where intentional torts and frauds have been perpetrated against the United States, in Utah, Texas, Louisiana and in Mississippi, by people who are undocumented foreign citizens?

4. Whether the Texas state laws and procedures can be used to adjudicate the claims arising under the False Claims Act by disregarding the mandates and procedures of the said Act?

5. Whether, due to a judgment obtained by frauds in Harris County District Court over a complaint on safety violations in a design in Texas, can be used to preclude False Claims Act violations and related claims arising in four states?

6. Whether a complaint over a safety violation in design filed over a period of six weeks can preclude False Claims Act related claims arising over 7-8 years, for swindling the United States (almost all of these arose afterwards under the doctrine of res judicata and collateral estoppel)?

7. Whether a claim in safety violation in a design can collaterally estop claims of defrauding the United States, which were never adjudicated?

8. Whether the litigation involving one party in a state court can be used to preclude claims against different parties in a subsequent action in the U.S. courts, under the doctrine of collateral estoppel?

9. Can a U.S. Magistrate rule on matters materially affecting the plaintiffs' interests without the parties' consents, disregarding the requires of U.S.C. §636 *et seq.*?

10. Can the U.S. District Court enter summary judgment in a case without permitting discovery under Federal Rules of Civil Procedure §12(b)(6), and under §56?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners: United States of America
ex. rel. Dilip K. Paul

Respondents: U. S. District Court for the Southern District of Texas, Houston Division and Parsons, Brinkerhoff, Quade & Douglas, Inc., PB-KBB, Inc. and Battelle Memorial Institute

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as 53 F.3d 1282 (5th Cir. 1995) and is re-printed in the Appendix, pages App.1 through App.6.

That opinion affirmed the decision of the United States District Court for the Southern District of Texas, Houston of August 1, 1994, dismissing Paul's qui tam complaint citing res judicata and collateral estoppel, which reported as *United States ex rel. Paul v. Parson, Brinkerhoff, Quade & Douglas, Inc.*, 860 F. Supp. 370 (S.D. Tex 1994) and which is re-printed in the Appendix, pages App.7 through App.17.

JURISDICTION OF THIS COURT

The U.S. District Court in Houston had exclusive jurisdiction to try this case under 31 U.S. C. §3732(a). Petitioner is the sole and original source of information of the frauds against the United States, and is entitled to bring this action under 31 U.S.C. §3730(b) and (h). The U.S. District Court also had the exclusive jurisdiction to try this case under 28 U.S.C. §§1331, 1332(a)(2), 1345, 1355, 1357 and 1407. The United States Court of Appeals for the Fifth Circuit had jurisdiction over the matter pursuant to 28 U.S.C. §1291. The judgment of that Court (Appendix pp. 1-6) was entered on April 28, 1995. A motion to submit a late petition for rehearing was granted on June 9, 1995, but the petition for rehearing was denied on July 10, 1995 (App, pp. 1-6). The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Constitution, Article I, Sections 8, 9 and 10; Article II, Section 2; Article III, Section I; Section II, and Article VI.

United States False Claims Amendments Act of 1986, 31 U.S.C. §3726 *et seq.*

STATEMENT OF THE CASE

Statement of the Facts

Battelle Memorial Institute invited a bid on behalf of the U.S. Department of Energy (DOE), Office of the Nuclear Waste Isolation (ONWI), in 1981, for designing 1/2 mile deep underground exploratory shaft facilities in Utah, Texas, Louisiana and in Mississippi. Parsons, Brinkerhoff, Quade & Douglas, Inc. (hereafter PBQD), and PB-KBB, Inc., forming a joint venture known as PBQD/PB-KBB, and along with subcontractors with people from six countries, spanning three continents, received a contract in June, 1982, after submitting a fraudulent bid. The contract required that the designs of the facilities be completed by the end of 1983, construction to be started at that time and be completed by 1985. However, defendants submitted false claims to the U.S. until 1988, and collected money, without ever completing a single contracted-for task.

None of the defendants have know-how as to how to perform the contracted for tasks. Defendants submitted fraudulent performances to the U.S.

Petitioner was an employee of PB-KBB, in their main office In Houston from mid-April, 1981. Upon joining the ONWI project office in mid-June, 1982, he determined that

the Battelle provided design concept would not comply with the written terms of the executed federal contract. He also determined that essential data, i.e., noxious, explosive, reactive and toxic gas occurrence data, in the subsurface geologic strata where the facilities were proposed to be constructed, essential for properly starting the contracted-for design process and calculations, were lacking. Dilip Paul wrote PBQD/PB-KBB's management that the design process could not be started without those vital data.

In retaliation and in conspiracy with their subcontractor German-owned Thyssen's Canadian domiciled employees, PBQD/PB-KBB fired Dilip Paul from the ONWI project office. PBQD/PB-KBB then assigned Dilip Paul's work to the Canadians, S. Poppen and J. Konopka. Together they did the fraudulent design, disregarding the requirements and use of geologic data. More importantly, Battelle, PBQD/PB-KBB, and their subcontractors repeatedly misrepresented the fraudulent work to the U.S.

After Dilip Paul was fired from the ONWI project office, he was sent back to the PB-KBB's main office where he wrote the memo on August 6; he was fired on August 18, 1982, by PB-KBB's Vice President Jack Schemedeman for writing the memo, and for making a record about PBQD/PB-KBB's fraudulent designs.

After he was fired, Dilip Paul filed a complaint with the EEOC and with MSHA in September, 1982. PB-KBB, in the meantime, initiated negotiations to hire him back. But after learning about his complaint to MSHA, which was sent by that agency to DOE and Battelle, PB-KBB refused to hire him back. Dilip Paul then filed a complaint with MSHA again for PB-KBB's second discriminatory retaliation.

When EEOC contacted PB-KBB on Dilip Paul's firing, PB-KBB, in their defense, submitted a forged letter in their defense. Dilip Paul ultimately withdrew his EEOC related

discrimination complaint from the U.S. District Court after filing there. Dilip Paul then filed with the Mine Safety Review Commission, which case was dismissed for lack of jurisdiction.

Mr. Paul then filed with the Texas State Court where PB-KBB perpetrated frauds on the court by stating that lack of work was an additional reason for Dilip Paul's firing and obtained a judgment in their favor. That judgment was also not on the merits as that court lacked jurisdiction over an essential party under Federal Rules of Civil Procedure 19, the Canadian, who conspired to have Dilip Paul fired and who profited as a result of his firing. PB-KBB refused to answer questions on who replaced Dilip Paul in the ONWI project office, and it kept hidden the facts about the Canadians replacing Dilip Paul in their Houston Office, while it was defending itself to the Mine Safety Review Commission.

PB-KBB's fraudulent "lack of work" defense contradicted its prior testimony to the Mine Safety Review Commission, where it stated that they had vacancies but they were looking for someone other than Dilip Paul due to his complaints to them and to MSHA, and due to his refusal to participate in their criminal enterprises.

After learning of Dilip Paul's complaint from MSHA, Battelle and PBQD/PB-KBB entered into a series of fraudulent contract amendments, design amendments and submitted to the U.S. a continuous stream of fraudulent designs until 1988, which ultimately led to the collapse of the project, where the government spent upward of $25 billion.

Petitioner filed the instant case under 31 U.S.C. §3730(b) and (h) on behalf of the United States and on his own behalf, on July 27, 1992 against PBQD/PB-KBB.

Petitioner then filed a similar complaint against

Battelle Memorial Institute. The two complaints were consolidated upon a motion of the U.S. Department of Justice and by the court order.

The issues in the instant case are different than those litigated in the Harris County District Court. There are more than 14 issues which were never litigated before. The issues arose under different circumstances, under different contracts and contexts, time-wise, space-wise, jurisdiction-wise. The claims also arose under different circumstances. These claims and issues could not have been brought at the time of Texas state court litigations as the contracts were still in progress.

The U.S. District Court, after denying Dilip Paul's discovery requests, entered summary judgment dismissing petitioner's complaints and citing *res judicata* and *collateral estoppel* due to his prior litigation against PB-KBB in the Harris County District Court. The court held that Texas State Court had concurrent jurisdiction, along with the U.S. courts, to try cases arising under the False Claims Act. Further, the court stated in its ruling that it is using the Texas state laws in deciding issues and claims arising from said Act. It determined that PBQD had a derivative relationship with PB-KBB, even though defendants' own pleadings submitted to the EEOC denied such relationship. The judge cited a Texas state law and collaterally estopped the petitioner to press its claims against PBQD. He *sua sponte* dismissed plaintiff's claims against Battelle, citing a Texas state case law. The court ignored the Canadians in determining the jurisdiction of the instant case, even though this issue was brought by the petitioner. The court disregarded the issue of PB-KBB's repeated perpetration of frauds in the courts even though the petitioner brought the issue in its pleadings. The court precluded petitioner from pressing his claims against defendants, even though those issues and claims

arose under different contracts, and arose years after his filing of the original case. Petitioner brought the issue of subsequent and collusive contracts in his pleadings in the District Court. The court ignored each and every issue and argument the petitioner brought in the instant case.

Petitioner then filed a timely appeal in the Fifth Circuit Court of Appeals, where the court summarily affirmed the Texas State Court judgment, stating that Harris County District Court has concurrent jurisdiction with the U.S. District Courts in deciding claims arising under the U.S. False Claims Act.

The Circuit Court did not review petitioner's other contentions that the state judgment was not the final judgment on the merits, but instead was void, because the state court lacked subject matter and in personam jurisdiction over indispensable parties; and that PB-KBB fraudulent obtained the judgment, stating that those issues were not raised in the District Court.

Dilip Paul then petitioned the Circuit Court that those issues have been brought in the District Courts, citing on the the records. The court below denied to review its decision on July 10, 1995.

This petition for certiorari to this Court is brought within 90 days, starting from July 10, 1995. Hence, this petition is filed timely.

REASON FOR GRANTING WRIT

Summary of Arguments

The case involved the summary decisions of the courts below, where petitioner believes the requirements of Article I, Sections 8, 9 and 10, and Article II, Section 3 of the U.S. Constitution are not complied with.

As per the legislative history, the False Claims Amendments Act of 1986 was enacted in order "to enhance Government's ability to recover losses sustained as a result of fraud against the Government." The Congress intended to enact the amendment in order to have uniform interpretation throughout the country, to protect whistle blowers from retaliation and to encourage private individuals to come out with information of wrongdoing and aid in furtherance of the intent of the Act.

This case is important because if it is allowed to stand as is, the whole statutory scheme behind the False Claims Act will be totally and irrevocably damaged. The judgments and rulings of the courts below are inconsistent with this Court's longstanding interpretations and holdings on Article I, Sections 8, 9, 10, and on Article III, Section 2 of the United States Constitution, as outlined in the cited case laws. The courts below have not only disregarded the Constitutional requirements in their summary judgments, but also disregarded a number of holdings of this court in a number of landmark cases. If the rulings of the courts below are allowed to stand, the violation of the Constitutional provisions will remain unaddressed and a number of case laws of this court will be automatically overturned.

For these reasons, this Court should grant certiorari to this case.

A Number of Important Questions of First Impression Before This Court

Arguments on Question No. 1

The courts below held that state courts have concurrent jurisdiction over the instant case. petitioner contends that this holding is erroneous under the following constitutional grounds. Article I, Section 8 of the U.S. Constitution provides,

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

As per the statutory history of the Nuclear Waste Management, the congress had to pass repeated legislations against vehement oppositions of every state of the Union, by asserting its Constitutional authorities in order to emplace the wastes. Further, the nuclear wastes come form defense as well as from civilian projects.

The U.S. contract in question and the obligations thereof arose under this provision of the Constitution. By explicit and implicit provision, the contractual terms shall have to be enforced uniformly throughout the United States. Under this provision, the U.S. courts have exclusive jurisdiction to uniformly adjudicate the contractual obligations arising therefrom. The state courts shall be excluded from adjudicating such contracts.

Further, Article I, Section 9 of the U.S. Constitution provides,

> "No money shall be drawn from the Treasury but in consequence of appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public money shall be published from time to time."

The money defrauded by the defendants were appropriated under this provision of the Constitution, and hence the U.S. courts will have exclusive jurisdiction to try the case as per the U.S. False Claims Act.

Again, Article I, Section 10 of the U.S. Constitution provides,

> "No State shall enter into any treaty, alliance or confederation; grant letters of Marque and Reprisal; coin money; Remit Bills of Credit; make any thing but gold and silver coin in tender in payments of debts; pass any Bill of Attainder, ex post facto law, or law impairing the obligation of contracts, or grant any Title of Nobility.
>
> "No State shall, without the consent of Congress, lay any duty of tonnage, **keep troops, or ships of war in time of peace,** enter into any agreement or compact with another State, or with a foreign power, **or engage in war,....**"
> [Emphasis added]

This is explicitly clear that the states are prohibited from getting involved in defense related activities and in passing any law which will interfere with U.S. contracts. As such, the state courts shall be excluded from adjudicating the instant case involving, nuclear wastes and obligations of U.S. contracts thereof, under this provision of the Constitution.

Further, the instant action arose under the U.S. False Claims Act and under U.S. Nuclear Waste Disposals-related Acts, and as such, under Article III, Sections 1 and 2 of the Constitution, the U.S. courts will have exclusive jurisdiction to try this case. Moreover, under the Supremacy Clause of Article VI, Section 2 of the Constitution, whatever extent Congress has exercised its powers, any "inconsistent" state laws are prohibited.

Hence, the courts below erred in holding that the state courts have concurrent jurisdiction, along with the U.S. courts, to adjudicate the instant case.

Arguments on Question No. 1(a)

Petitioner agin contends that the courts below erred in their rulings over the instant case, based upon every one of this court's determinations on this issue.

In *Martin v. Hunter's Lease*, 14 U.S. (1 Wheat.) 334, 335, 4 L.Ed 97, 104, 105 (1816), this court stated,

> "In what cases (if any) is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, 'and that the judicial power shall extend to all cases'; but in the subsequent part of the clause which embraces all other cases of national cognizance, and forms the second class, the word "all" is dropped seemingly ex industria. Here the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, etc. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some

determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases;....

"The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arriving under the Constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdictions over such cases could not exist in the state courts previous to the adoption of the Constitution, and it could not afterwards be directly conferred on them; for the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety.

"All these cases, then, enter into the national policy, affects the national rights, and may affect the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever."

The instant case belongs to Class I, as outlined in this case law. Hence the state courts will not have jurisdiction to try this case. The holdings of this case law is upheld by the following case law and by every other case

In *The Moses Taylor v. Hamons*, S.C. 4 Wall, 411-431 at 428-429 (1866), this Court agreed with the conclusions reached in *Martin v. Hunter's Lease, supra*, by stating,

> "The Constitution declares that the judicial power of the United States 'shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies to the United States shall be a party; to controversies between two or more states, between a state and citizens of another state; between citizens of different states, between citizens of a state claiming lands under grants of different states; and between a state or citizens thereof and foreign states, citizens or subjects.' Art. III. 2.
>
> "The vital importance of all the cases enumerated in the first class to the national sovereignty is mentioned as a reason which may have warranted the distinction, and which would seem to require that they should be vested exclusively in the national courts--a consideration which does not apply, at least with equal force, to cases of the second class.

> Without, however, placing implicit reliance upon the distinction stated, the learned justice observes, in conclusion, that it is manifest that the judicial power of the United States is, in some cases, unavoidably exclusive of all state authority, and that in all others it may be made so at the the election of Congress. We agree fully with this conclusion. The legislation of Congress has proceeded upon this supposition. The judiciary act of 1789, in its distribution of jurisdiction to the several federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts."

Again as per this Court's citation of *Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255 at 259, 18 S.Ct. 62 at 64, 42 L.Ed 458, in *Pan American Petroleum Corp. v. New Gas Title County et al.*, 366 U.S. 656 at 664-665 (1961), the state courts will not have subject matter jurisdiction to try the instant case.

> "There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading--be it a bill, complaint, or declaration --sets up a right under the patent laws as ground for recovery. Of such the state courts have no jurisdiction."

The instant case clearly belongs to Class 1 type, as characterized by this Court.

From the numerous cases decided by this Court, there is no concurrent jurisdiction of the state courts with the U.S.

courts in deciding the instant case. So *res judicata* by adopting Restatement (Second), and collateral estoppel, entered by the District Court in Houston, and affirmed by the Fifth Circuit Court of Appeal, is clearly in error.

In *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1912), this Court stated,

> "Of course, the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit arising under'-----. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the defense, even when anticipated and replied to in the bill. *Devine v. Los Angeles,* 202 U.S. 313, 334, 50 L.Ed 1046, 1053, 26 S.Ct.Rep.652. Conversely, when the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim."

In *Slocum v. Mayberry et al.*, 2 Wheat 8, this court stated, "If the officer has right, under the laws of the United States,...the question...belongs exclusively to the federal courts, and cannot be drawn in another forum,..." Again in the same case, this court stated, "The detention would have been by virtue of an act of Congress, and jurisdiction of a state court could not have been sustained."

For the aforesaid reasons, the judgments entered in the instant case by the courts below, do not comply with **Article III, Section 2 of the United States Constitution,** as interpreted by this Court in the cited case laws, and are therefore void.

Further, in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479, 101 S.Ct. 2870, 2875 (1981), this court stated,

> "Congress, however may confine jurisdiction to federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."

Petitioner contends that Congress has explicitly (31 U.S.C. 3732(a) and (b)) given jurisdiction exclusively to the Federal Courts.

[Legislative History, P.L. 99-562, Senate Report No. 99-345, page 4, The False Claims Act was

> "Enacted in 1863 in response to cases of contractor fraud perpetrated on the Union Army during the Civil War, this statute has been used more than any other defending the Federal Treasury against unscrupulous contractors and grantees."]

Article II, Section 2 of the Constitution, explicitly makes the President as Commander-in-Chief, and hence the act enacted to protect that Army shall be adjudicated exclusively by the Federal Courts and states are prohibited to interfere with such Acts.

The Congress specifically stated on page 7,

> "Unlike most other types of crimes of abuses, fraud against the Federal Government can be policed by only one body--the Federal Government. **State and local law enforcement are normally without jurisdiction where Federal funds are involved.**"

On Page 16 of the same Senate Report, it was stated,

> "And finally, in response to comments from the National Association of Attorneys General, the subcommittee adapted a provision allowing State and local governments to join state law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence."

This statement clearly indicates that Congress did not want State courts to have concurrent jurisdiction over this Act.

The Congress confined the jurisdiction of False Claims Act adjudications to the Federal Courts implicitly as well. See Legislative History, P.L. 99-562, page 23, 31 U.S.C. §3729, subsection (e), wherein it is stated,

> "Under Federal Rule 64, Federal Rules of Civil Procedure, the Government's pre-judgment attachment remedies are governed by State law in the district in which district court is held. A uniform Federal standard for the employment of these remedies in cases brought under the False Claims Act would significantly enhance the Government's litigating ability in this area, by avoiding the whims and vagaries of widely varying state procedure for attachment. The bill contains effective remedies to prevent a potential defendant's dissipation of assets pending litigation. These remedies flow from the district court's inherent power to grant injunctions."

The Congress also gave jurisdiction to try such cases to the U.S. Claims Courts (Legislative History, P.L. 99-562, Senate Report No. 99-345, page 33, §3732, subsection (b)). There was absolutely no consideration given to grant jurisdiction to the state courts.

Obviously, when Congress did not give jurisdiction to the state courts, the courts below could not give jurisdiction arbitrarily.

Further, there is a clear and definite incompatibility of False Claims Act's intent and states' interest in the adjudication of the Act. In fact, many state agencies have become defendants in cases arising out of the False Claims Act. The False Claims Act deals with U.S. funds, and all of the states are in the receiving ends of the U.S. funds. When states are competing with each other for U.S. funds, obviously Congress could not have empowered them to adjudicate False Claims Act related cases. The states have conflict-of-interest when adjudicating federal funds. Hence, as such, there is a clear incompatibility for state courts' adjudication of such cases. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 4 L.Ed 579 (1819).

Arguments on Question No. 2

Plaintiff brought the issue of an undocumented Canadian domiciled employee, J. Konopka, replacing Dilip Paul in the ONWI project office, in the U.S. District Court in Texas. Plaintiff also pleaded diversity jurisdiction in the said court. Again, plaintiff pleaded in the same court that decisions regarding the bidding and performance of the U.S. contracts were made by people living in Germany. These issues are on records, and can be verified **(records, response by qui tam plaintiff to PBQD's response, dated 11/8/95, deals with diversity jurisdiction, pp. 1-52; for bringing the issues of Canadian domiciled, see p. 38 of the same response. Further, see record, response by qui tam**

plaintiff to Battelle's response dated 12/9/93, summary page which deals with diversity jurisdiction, subject matter jurisdiction, and territorial jurisdictions. Also see record, qui tam plaintiff's response of 1/18/94 to defendant's motion, p. 16, argued about jurisdictional issues, specifically about state court's personal jurisdiction over people of Germany making decisions on the contract).

These pleadings fully satisfy the requirements of Federal Rules of Civil Procedure (FRCP Nos. 7, 8, 9, 10 and 11). Petitioner also submitted the contracts and other exhibits in the U.S. District Court, which fully satisfy the requirements of pleadings, under FRCP 10(c). Also see *Arfons v. E. I. DuPont De Neumours & Co.*, C.A. 2d, 261 F.2d 434 (1958); *Sisk v. Texas Wildlife Dept.*, C.A. 5th, 644 F.2d 1056, 1059 (1981); *Robins v. Rarback*, C.A. 2d, 325 F.2d 929, certiorari denied, 85 S.Ct. 670, 379 U.S. 974, 13 L.Ed 2d 565 (1963). In *U.S. v. Provident National Bank*, 259 F.Supp. 373, certiorari denied, 87 S.Ct. 778, 385 U.S. 1034, 17 L.Ed 2d 682 (D.C. Pa. 1966), it was held, "Pleadings are not to be held to the rigid standards of common law, and neither absolute clarity nor absolute precision is required."

Defendants did not deny any of the allegations made on these issues in the U.S. District Court. Due to their non-denials, they also admitted these jurisdictional allegations in the district court.

These issues were brought to underscore diversity jurisdictions and Texas state court's lack of in personam jurisdictions over these foreign citizens, who are indispensable parties, under FRCP 19, to try the instant case.

The U.S. District Court did not mention about the diversity and in personam jurisdiction issues while entering summary judgment in the case. These were brought by the plaintiff in his appeal in the Fifth Circuit Court. However, in its summary decision, the appeal court stated that it could not review those issues, as those were not brought in the

district court. Plaintiff then petitioned the Fifth Circuit Court for rehearing the case, stating that he brought these issues in the district court, and cited on records, mentioning where those issues can be found. However, the appeal court denied rehearing of the case.

As mentioned in the statement of the case above, that PBQD/PB-KBB employed as many as six subcontractors, with people from six different countries, spanning from three continents, while they were defrauding the United States, in violation of the False Claims Act.

However, the U.S. District Court as well as the Court of Appeals erred while entering their summary judgments, by holding that plaintiff could have litigated the instant case in the Harris County District Court, by totally disregarding the issues of in personam jurisdiction and diversity of defendants. These major issues could have totally changed the outcome of the case. But the treatments given in the summary proceedings in the court below, without following the Federal Rules of Civil Procedures and appellate procedures, have led to these erroneous decisions in the case.

Arguments on Question No. 3

As per *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 NE 2d 761 (1961), and as per *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972), the jurisdiction to try the case of the intentional torts liabilities will be in those counties where the victims would be affected. Hence, the intentional torts of criminal mine design would not affect the people of Harris County, but would affect the people of the seven counties spread over four states where the federal facility sites are located. So the jurisdiction to try the instant case would be in those seven counties and not in Harris County. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 24 L.Ed 565 (1877). This would be the case if the tort feasors were all U.S. domiciled.

But when the tort feasors were foreign citizens, domiciled in Canada and in other countries, the state courts would lack the in personam jurisdiction over the parties to try the case and the instant case can only be tried in a U.S. court.

Further, the solicitation, bidding and the execution of the Battelle-PBQD/PB-KBB contracts at issue were done from Columbus, Ohio. Under *Burger King v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed 2d 578, the jurisdiction to try the instant case will be in Ohio. Again, Harris County District Court could not try the instant case.

Arguments on Question No. 4

This court has repeatedly held the position that the rights and duties of the United States, when dealing with such cases such as the one arising under the False Claims act, are governed by federal rather than by local law. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed 838 (1943); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed 2d 711 (1979).

Petitioner contends that both the U.S. District Court in Houston and the Fifth Circuit Court of Appeals erred in their summary rulings that Texas state laws would govern in deciding the instant case.

The Congress specifically stipulated how the False Claims Act would be adjudicated, which tribunal(s) to decide the claims arising out of the Act, and have repeatedly emphasized the need for uniform interpretation of the Act. This court has taken the position in *Galveston, H & S.A.R. Co. v. Wallace*, 223 U.S. 841, 488 (1911) that cases such as the instant one must be adjudicated following the statutory directives, and local laws and rules cannot be applied in deciding the instant case. Hence, the courts below erred in their rulings.

Arguments on Question No. 5

Petitioner brought the issue of PB-KBB's obtaining the judgment by frauds in the Texas state court, in his appeal to the Fifth Circuit. The Fifth Circuit Court declined to review the issue stating that the issue was not brought in the U.S. District Court. Petitioner brought that issue of frauds in the District Court. **(See record, response by qui tam plaintiff to PB-KBB's response dated 11/8/93, pp. 1-56, dealing with frauds on the court and with jurisdiction.)** For those reasons, the Fifth Circuit Court of Appeals erred in declining to review the issues.

Judgment obtained by frauds have no judicial value, and that judgment cannot have any preclusive effect. PB-KBB, after firing Dilip Paul, turned over his job functions to the Canadians and came back to the Texas state jury and stated that lack of job was an additional factor, besides his complaint on unsafe mine design, in terminating Paul. This assertion in the court was fraudulent, perjurious and was in contradiction to its prior admissions to the Mine Safety Review Commission's proceedings. In there, PB-KBB stated that they had vacancies, they hired people and they were looking for someone other than Dilip Paul. So lack of job was the fraudulent defense, by which they won the judgment in the Texas court. In the Texas court, the judgment was brought by perjurious changing of their prior defense, which is in the records.

Further, the Canadians conspired to have Dilip Paul fired and took over his job functions. PB-KBB was hiding facts about the Canadian conspiracy in the Mine Safety Review Commission proceedings and in the Texas state court, and they could not be brought in the trial. The Canadians are an indispensable party under FRCP 19, and the Texas court judgment, entered without them, is void. *Hanson v. Danckla*, 357 U.S. 235, 78 S.Ct. 1228, 220 L.Ed 2d 70, 1283.

The Canadians are an indispensable party in the instant case as well. The Texas state court has no jurisdiction over them and the instant case could not be brought in the Harris County District Court. Hence, *res judicata* and *collateral estoppel*, using Restatement (Second), cannot be used in the instant case.

Arguments on Question No. 6

The claims in the instant case were never litigated and could not be done in the Texas state court. Most of the false claims submitted to the U.S. and money collected, over a period from 1982 through 1988, were done after Dilip Paul was fired and after he submitted his complaint to the MSHA. Most of the issues arose after Dilip Paul was fired by PB-KBB, and were never litigated and could not be litigated in the Texas state court. Dilip Paul was in the ONWI project for six weeks, mid-June, 1982, through the end of July, 1982. However, the false claims arose from mid-1981, when a fraudulent bid was submitted, and ended in 1988, over a period of seven years when Congress cut down further funding of the project.

The contracts and the designs have been changed a number of times as a result of Dilip Paul's litigations, and most of the false claims were submitted under the new or changed contracts, and the U.S. was defrauded under the new contracts. The claims under the new contracts arose under new scope of work, after the filing of Dilip Paul's complaint and they could not be brought at the time of original lawsuit.

Hence, as per this court's holding in *Commissioner of Internal Revenue v. Sunnen*, 33 U.S. 591, 592, 68 S.Ct. 705, 92 L.Ed 898 (1948), petitioner's claims arose after his filing of the initial claims, under different contracts, under a different scope of work, could not be collaterally precluded from subsequent litigations.

Further, those issues raised in the instant case were not actually litigated and could not be litigated in the Texas state court. Hence, as per *Cromwell v. County of Sac.*, 94 U.S. (4 Otto) 351, 24 L.Ed 195 (1876) (Restatement [Second] of Judgment, 27), petitioner cannot be collaterally estopped from subsequent litigations over those issues.

Therefore, the judgments entered in the courts below are erroneous, contrary to many of this court's holdings.

Arguments on Question No. 7

The United States is the real party of interest in the instant case. It was not a party in the original *Paul v. PB-KBB* litigation in the Texas state court. As per *U.S. v. Mendoza*, 464 U.S. 154 (1984), the instant case cannot be collaterally estopped.

Arguments on Question No. 8

The original lawsuit was between *Paul v. PB-KBB*. There is no corporate relations or privity between PBQD and PB-KBB, as per PBQD and its parent company, Parsons & Brinkerhoff, Inc.'s own submissions to the EEOC. There is no derivative relationship between the parties. Moreover, PBQD is in conspiratorial relationships with the Canadians in defrauding the United States, over whom the Texas state court lacked jurisdiction. For that reason, PBQD and their conspiratorial Canadian partners could not be tried by the Texas state courts.

As PBQD remained liable to the United States and to the petitioner, so does Battelle because of its complicity and collusion in defrauding the United States, and due to its vicarious liability. All of the parties are liable to Dilip Paul for discrimination under 31 U.S.C. §3730(h).

Wherefore, the courts below erred in collaterally estopping Dilip Paul from pressing U.S. claims, and his own claims in the instant case against PBQD and against Battelle.

Arguments on Question No. 9

In the instant case, U.S. MAGISTRATE, Marcia Crone, acted without petitioner's consent or authorization, disregarding the requirements of 28 U.S.C. §636 *et seq.*. She took decisions in the case which has materially affected petitioner's rights. This court should review her role in the case.

Arguments on Question No. 10

In the instant case, Magistrate Crone denied petitioner's motion for compelling discovery. The summary judgment was entered in the instant case in the Houston District Court without allowing any discovery procedure and without following the requirements of Federal Rule of Civil Procedure §12(b)(6) and Rule 56. Those rules require discovery and ascertainment of fact that no triable issues left prior to entering summary judgment. But none of the Federal Rules of Civil Procedures were followed and as a result numerous triable issues surfaced, as can be seen in this petition for certiorari. Those issues should have been resolved prior to the entering of summary judgment in the case.

This is explicitly clear that the states are prohibited from getting involved in defense related activities and in passing any law which will interfere with U.S. contracts. As such, the state courts shall be excluded from adjudicating the instant case involving, nuclear wastes and obligations of U.S. contracts thereof, under this provision of the Constitution.

CONCLUSION

If the decision of the court below is allowed to stand, it would discourage whistle-blowers. The cheating federal contractors will be encouraged to shop around the country to locate their business where the state court, using local laws, would treat them favorably. It will have an undesirable

affect which would enable the states to compete for cheating federal contractors to locate business in their territory.

Petitioner further contends that, in that case, a number of landmark case laws of this court will automatically be reversed. For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20640
Summary Calendar

DILIP KUMAR PAUL,

Plaintiff,

DILIP KUMAR PAUL,

Plaintiff-Appellant,

versus

PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. ET AL.,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas CA-H-92-2429 c/w 92-2792

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM[1]

Dilip Kumar Paul appeals, *pro se*, the dismissal of his *qui tam* action under the False Claims Act, 31 USC §3730, *et seq*. We **AFFIRM**.

(Local Rule 47.5.1. provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.)

DILIP KUMAR PAUL,

Plaintiff,

DILIP KUMAR PAUL,

Plaintiff-Appellant,

versus

PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. ET AL.,

Defendants-Appellees

REPORT AND RECOMMENDATION

I. Factual Background

Paul was employed by PB-KBB, an engineering firm, in May 1981. In June 1982, PB-KBB and Parsons, Brinkerhoff, Quade & Douglas, Inc. (PBQD) formed a joint venture (PB/PB-KBB) and entered into a contract with Battelle Memorial Institute (BMI) to provide architectural and engineering design services for the construction of exploratory shafts to investigate geological features of potential nuclear

waste disposal sites in salt formations. BMI assigned the contract to the United States Department of Energy (DOE, and PB/PB-KBB submitted claims for payment to DOE.

Paul was assigned to work as a mining engineer on the joint venture project in June 1982; he was transferred to another division of PB-KBB that July, and was discharged that August (See *Paul v. PB-KBB, Inc.*, 801 S.W.2d 229, 229 (Tex Ct.App.1990). He filed suit against PB-KBB in Texas State Court, claiming that he was wrongfully discharged for being unwilling to commit an illegal act, alleging that the preliminary study regarding the shaft design "could've killed people," and that he was fired for his objections to that project. *Id.* The jury's verdict in favor of PB-KBB was affirmed on appeal in 1990. *Id.* at 230.

In August 1992, Paul filed a qui tam complaint, pursuant to False Claims Act (FCA), against PB-KBB and PBQD, claiming that they knowingly presented or caused to be presented, false or fraudulent claims to the United States government. After he filed a similar complaint against BMI, the two actions were consolidated. The government declined to intervene. The defendants moved to dismiss, asserting, inter alia, that the action was barred by *res judicata*; and the district court agreed. *United States ex rel. Paul v. Parson, Brinkerhoff, Quade & Douglas, Inc.*, 860 F.Supp. 370 (S.D. Tex. 1994).

II. Discussion

Paul contends that res judicata does not bar his action because (1) the state court action was void; (2) the parties to the federal and state actions are not the same; and (3) the two actions do not constitute the same cause of action.

The application of res judicata of law which we review *de novo*, e.g., *Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 1031 (5th Cir. 1991). "When applying the doctrine of *res*

judicata we look to the effect that a Texas state court would give to a prior Texas state court judgment. *Id. at* 1031. Under Texas law,

> "...an existing final judgment rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties in all other actions on the points at issue and adjudicated in the first suit. Further, the rule of *res judicata* in Texas bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those which were actually tried."

Id. (Quoting *Abbot Laboratories v. Gravis*, 470 S.W. 2d, 639, 642 (Tex. 1971).)

A. State Judgment

Paul contends that the state judgment was not a final judgment on the merits, but instead was void, because the state court lacked subject matter and in personam jurisdiction over indispensable parties; and that PB-KBB fraudulently obtained the judgment. Because he did not raise these issues in the district court, we decline to exercise our discretion to consider them. See *Highlands Ins. Co. v. National Union Fire Ins. Co.*, 27 F.3d 1027, 1031-32 (5th Cir. 1994) (applying, in civil case, plain error analysis of United *States v. Olano*, ____U.S.____, 113 S.Ct. 1770 (1993)), cert. denied, ____U.S.____ 115, S.Ct. 903 (1995).

B. Identity of Parties

Next, Paul contends that there is no identity of parties

The identity-of-parties test is satisfied, not only as to the parties to the earlier litigation, but also as to those in privity with them. See *Soto v. Phillips*, 836 S.W.2d 266, 269 (Tex.Ct.App. 1992).

Paul asserts the PBQD and PB-KBB are jointly and severally liable as joint venturers, and that BMI, as general contractor, is vicariously liable for the actions of its sub-contractors, PB/PB-KBB. As the district court noted, the allegations against the defendants are "virtually identical." 860 F.Supp. at 373. We agree with the district court that there is privity among the defendants. See *Soto,* 836 S.W. 2d at 270 ("When the allegation is that the parties were in a vicarious relationship,...a judgment for the principal bars a later suit against the agent.").

C. Claims Issue

Finally, Paul contends that "the claims in the instant case are different than those tried in the Texas state court." He maintains that he could not have asserted his FCA claims in the state action because federal courts have exclusive jurisdiction over such claims.

> [U]nder Texas law a different cause of aaction is one that proceeds not only on a sufficiently different legal theory but also on a sufficiently different factual footing as not to require the trial of facts material to the former suit; that is, an action that can be maintained even if all the disputed factual issues raised in the plaintiff's

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[2]For the first time on appeal, Paul asserts that the government is a party to the suit and was not in privity with the parties to the state action. Even if we were to exercise our discretion to consider this assertion, we would find it frivolous, because the government declined to intervene in this action.

> original complaint are conceded in defendant's favor.... A different cause of action is not merely a different theory of recovery, it should differ in the theories of recovery, the operative facts, and measure of recovery.

Hogue v. Royse City, TX, 937 F.2d 1249, 1253 (5th Cir. 1991) [internal quotation marks and citations omitted]

Paul's FCA action arises from the same operative facts which gave rise to the prior state action -- activities connected to the contract between BMI and the joint venture regarding preliminary designs for nuclear waste disposal shafts. In his state action, Paul alleged that he was discharged because he refused to commit an illegal act of certifying the plans and specifications for the preliminary design. *Paul, supra* at 229-30. In the instant action, Paul alleges that PBQ&D and BMI participated with PB-KBB in committing the illegal acts of certifying the plans for the preliminary design. Accordingly, the operative facts underlying the two actions are the same. Paul's assertion that he could not have asserted his FCA claims in the state court action is erroneous; state courts have concurrent jurisdiction over FCA claims. See *United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F.Supp. 624, 631-32 (N.D. Ill. 1992).[2]

III. Affirmation

For the foregoing reasons, the judgment is AFFIRMED.

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[3]The parties have filed numerous motions and cross-motions, all of which are denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20640

DILIP KUMAR PAUL, et al.,

Plaintiffs,

DILIP KUMAR PAUL,

Plaintiff-Appellant,

versus

PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. ET AL.,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas CA-H-92-2429 c/w 92-2792

ON PETITION FOR REHEARING
(July 10, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges

PER CURIAM: DENIED

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.
ENTERED FOR THE COURT:

---------s---------

RHESA H. BARKSDALE
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA) ex rel. DILIP KUMAR PAUL,)	CIVIL ACTION
Plaintiff,)	No. H-92-2429
v.)	(Consolidated with Civil Action No. H-92-2792
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. and PB-KBB,)	
Defendants.)	

ORDER

Pending before the Court is the Motion to Dismiss, or in the alternative, motion for Summary Judgment and Renewal of Request for Sanctions filed by defendants Parsons, Brinkerhoff, Quade & Douglas, Inc. (PBQ&D). Having considered the motion, submissions, and the applicable law, the Court determines that the motion to dismiss should be granted and request for sanctions denied. The Court further determines that defendant Battelle Memorial Institute (BMI) should be dismissed sua sponte for the same reasons stated herein.[1]

Plaintiff Dilip Kumar Paul (Paul) initiated this cause of action pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. §3730, *et seq.*, against PBQ&D, and PB-KBB. Although the False Claims Act provides the United States

[1] A district court may dismiss a case upon its own motion. ------ *v. Brazos County*, 981 F.2d 237, 242-43 (5th Cir.)43

Government the opportunity to intervene in a qui tam suit brought under the Act, the United States elected not to intervene in this case. See Document 15. In the complaint, Paul alleges that the defendants "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the Government...a false or fraudulent claim for payment or approval." 31 U.S.C. §3726(1). A similar cause of action brought against BMI was consolidated with the instant case.

Paul was first employed by PB-KBB, an engineering firm, in June 1981. In June 1982, PB-KBB and PBQ&D formed a joint venture (PB/PB-KBB) to function as subcontractor to BMI. Since 1978 BMI has been responsible for the management of the United States Department of Energy's (DOE) National Waste Terminal Storage Program. PB/PB-KBB was employed by BMI to design an exploratory shaft for a nuclear waste storage project for the DOE. On October 7, 1982, the DOE approved the subcontract and on November 23, 1985, BMI assigned the subcontract to the DOE. As a result of the assignment, PB/PB-KBB submitted all of its claims for payment directly to the DOE. It is the submission of these claims for payment by PB/PB-KBB to DOE that Paul alleges were fraudulent and form the basis of his False Claims Act causes of action.

When the joint venture was formed in June 1982, Paul was selected as a mining engineer on the project. Paul was instructed by PB- KBB to perform a trade-off ventilation study. *Paul v. PB-KBB, Inc.*, 801 S.W. 2d 229 (Tex. App.--Houston [14th Dist.] (1990), writ denied).[2] By mid-July 1982, Paul had not completed the trade-off study and was transferred to the "Infrastructure" division of PB-KBB. During the first part of August 1982, Paul was discharged.

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[2]This case refers to a state court suit filed by Paul against PB- KBB.

Following his dismissal, Paul filed suit against PB-KBB in Texas state court alleging that he was wrongfully discharged for his unwillingness to commit an illegal act. *Id.*[3] Paul claimed that "the preliminary study called for one shaft rather than two and [the preliminary study] design 'could've [sic] killed people.'" *Id.* Paul argued that he was fired for his objections to the project. *Id.* After a jury verdict for Paul's employer was affirmed by the Texas Court of Appeals, Paul filed this complaint.

PBQ&D and PB-KBB contended that this case should be dismissed on the following basis: (1) *res judicata*; (2) the lack of federal court jurisdiction; (3) the failure of Paul to allege "fraud" and "guilty intent" under the False Clams Act; (4) the failure of Paul to state a cause of action for retaliation under the False Claims Act; and the expiration of the statute of limitations. The Court finds that because Paul could have raised the False Claims Act allegations contained in the complaint when he filed the prior state action, the principle of res judicata supports dismissal of his complaint in this action.

When a decision is rendered on the merits of a case by a court of competent jurisdiction, the judgment is conclusive for the parties and their privies "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Nevada v. United States*, 443 U.S. 109, 129-30 (1983).

As the prior lawsuit was brought in Texas state court, this court will give full faith and credit to the state court judgment pursuant to 28 U.S.C. §1738, and will apply in its evaluation of the effect res judicata has on the complaint. *Hoque v. Royse City, Tex.*, 939 F.2d 1249, 1252 (5th Cir. 1991).

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[3]Paul has filed two other causes of action against PB-KBB. See Document #30 at 3-4.vi

In order for res judicata to apply, four requirements must be met: (1) the parties must be identical in both suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction on the merits; and (4) the same cause of action must be involved in both cases. *Eubanks v. F.D.I.C.*, 997 F.2d 166, 169 (5th Cir. 1992). In this case, the second and third requirements have been met as the prior lawsuit was adjudicated by the state court and affirmed by the Texas Court of Appeals. See *Paul, supra* at 229.

The first and fourth requirements for the application of res judicata, that "the parties...be identical in both suits," and that "the same cause of action...be involved in both cases," are the two issues for consideration in review of the defendants' motion to dismiss. *Eubanks, supra* at 169.

Pursuant to Texas law, the first requirement for the application of res judicata to bar a subsequent cause of action, the "identity of parties" test, does not demand strict identity. Rather, parties in the subsequent action are considered "identical" to parties in the previous action if the non-parties are in privity with the earlier parties. *Getty Oil v. Insurance Co. of N. America*, 845 S.W.2d 794, 800 (Tex. 1992) (stating that there is no general definition of privity that can be automatically applied in all *res judicata* cases; the circumstances of each case must be examined). Having examined the relationship between PBQ&D and PB-KBB, this court finds the requisite privity to bar this complaint. In addition, the court finds privity between BMI the general contractor, and PBQ&D and PB-KBB, the subcontractors.

PBQ&D has asserted two related grounds to support its privity argument with PB-KBB. First, PBQ&D argues that its liability is derivative of PB-KBB's, and therefore the False Claims Act cause of action against PBQ&D should be barred. PBQ&D cites Texas law which holds that "where the rights and liabilities of a party are derivative, a judgment

derived may be set up as a bar in the second suit." *Lemon v. Spann*, 633 S.W.2d 568, 570 (Tex. App.--Texarkana 1982, writ ref'd n.r.e.) .

PBQ&D's second argument to establish privity centers on the fact that PBQ&D was one of the joint venturers, along with PB-KBB, to which BMI subcontracted the design of the exploratory shaft facility. The gravamen of Paul's complaint is that PBQ&D and PB- KBB acted together to defraud the government. Paul continually refers to PBQ&D, BMI, and PB-KBB simply as "defendants" when alleging wrongdoing. Paul's allegations against the defendants are virtually identical. Thus, PBQ&D maintains that privity exists between the defendants and *res judicata* bars Paul's complaint.

PBQ&D also claims that because it is joined as a defendant with PB-KBB in the complaint, it is in a vicarious relationship with PB-KBB. In situations of vicarious liability, a judgment for one of the parties in the vicarious relationship bars a later action against the other. Thus, PBQ&D maintains that Paul's complaint against it should be dismissed as a result of PB-KBB's success in the state court action. *Soto v. Phillips,* 836 S.W.2d 266, 269 (Tex. app.--San Antonio 1992) writ denied (citing Restatement [Second] of Judgments 51(1) (1982)). As a general contractor, BMI is also in a vicarious liability relationship with its subcontractor, PB-KBB. See e.g., *United States v. Blair*, 321 U.S. 730 (1944).

There are two exceptions to the rule that bar an unsuccessful plaintiff from reasserting a claim against a subsequent defendant alleged to be vicariously liable to the original defendant. Such a claim may not be reasserted unless: (1) the claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or (2) the judgment in the action was based on a defense that was personal to the

is a defendant in the first action. Restatement (Second) of Judgments §51(1) (1982). In this case, the complaint is based upon Paul's allegation that PB/PB-KBB and BMI submitted "a false or fraudulent claim for payment or approval [to the DOE]." §31 U.S.C. §3729(1). Paul alleged in the prior lawsuit that his certifying design plans for the project, which he believed were dangerous, would have constituted a violation of §22.05 of the Texas Penal Code, which proscribe "reckless conduct." Paul alleges that his refusal to certify the plans resulted in his termination. In addition, if Paul would have certified the project design,he would have played a role in the submission of the allegedly false claim to the DOE. Given the similarity between the two claims, the grounds for this complaint in this case could have been asserted in the first action.

The second exception also does not apply. The concept of "personal defense" is addressed by the Texas Business and Commercial Code in its explanation of the rights of the holder in due course of a negotiable instrument. A holder in due course may take an instrument free from all defenses of any party to the instrument with whom the holder has not dealt, except personal defenses. Tex. Bus. & Comm. Code §3.305 (1967).[4] Because PB- KBB's defense to the wrongful discharge action was not a personal defense, the second exception does not apply.

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[4]The Texas Business and Commercial Code defines the five personal defenses as: (1) Infancy...; and (2) such other incapacity, or dures, or illegality of the transaction, as renders the obligation the party a nullity;... (3) ...misrepresentation [that] has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms;... (4) discharge in insolvency proceedings; and (5) any other discharge of which the holder has notice when he takes the instrument. Tex. Bus & Comm. Code §3.304 (1967).

Res judicata operates on the principle that any cause of action which arises out of the same facts should, if practicable, be litigated in the same suit. *Barr*, 837 F.2d at 631. A different cause of action has been defined by Texas courts as "one that proceeds not only on a sufficiently different legal theory but also on a sufficient different factual footing." *Hoque,* 937 F.2d at 1253. To be considered "different," the cause of action must differ in the theories of recovery, the operative facts, and the measure of recovery. *Id.*

In examining the above three factors, Texas courts have utilized the transactional approach to claim preclusion. *Barr*, 837 F.2d at 631. The transactional approach "provides that a final judgment an action extinguishes the right to bring suit on the transaction, or a series of connected transactions, out of which the action arose." *Id.* In analyzing the transactional approach, factors to be considered are: (1) whether the facts are related in time, space, origin, or motivation; (2) whether they form a convenient trial unit; and (3) whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage. *Id.* (Quoting Restatement of Judgment 24(2).)

In this case, the complaint arose form the same operative facts that gave rise to the prior lawsuit. The claims in Paul's complaint could have been adjudicated with the prior lawsuit, forming a convenient trial unit. As aforementioned, Paul alleged in the prior lawsuit that PB-KBB was engaged in illegal activities and his failure to participate in those activities led to his discharge. Paul alleges that PBQ&D and BMI participated with PB-KBB in the illegal acts. Although the complaint asserts a new theory and measure of recovery, the alleged filing of false or fraudulent claims, the operative facts are the same as those in the prior lawsuit.

The second factor of transactional approach, whether the two clams could have formed a "convenient trial unit, "

The following is a jurisdictional question. Whether the state court had jurisdiction over the federal False Claims Act claims is a question of first impression in this circuit. After a thorough review of other jurisdictions, it appears that only one other court has decided the question whether there is exclusive federal jurisdiction over cases brought pursuant to the False Claims Act. In *United States ex rel. Hartigan v. Palumbro Bros., Inc.*, the court held that there is concurrent jurisdiction over the False Claims Act cases.[5]

In *Tafflin v. Levitt*, 493 U.S. 455 (1990), the Supreme Court discussed concurrent jurisdiction in holding that federal civil RICO suits could be brought in state court. The Court recognized that it has "consistently held that state courts have inherent authority and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Id.* at 460. State courts are courts of general jurisdiction. When a federal statute intends that claims arising under it be litigated in a specific jurisdiction, the statute will explicitly state that suit may be brought "only" in federal court, or that the jurisdiction mentioned by the statue shall be "exclusive." *Id.* at 801 (Scalia, J. concurring). If exclusive jurisdiction is neither express nor implied by the statute, state courts will have concurrent jurisdiction. *Claflin v. Houseman*, 93 U.S. 130, 136 (1876).

The False Claims Act states that an action arising under it "may" be brought in federal court. 31 U.S.C. §3732 (1876). Thus, pursuant to the language of the statute, there is concurrent jurisdiction between the federal and state courts. See *Charles Dowd Box Co. v. Courtney*, 638 U.S. 502 (1962).

Finally, the third element of the transactional approach to claim preclusion states that future claims will be barred if it is reasonable to presume that the parties would expect the two actions to be treated together in the original case.

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[5] 597 F.Supp. 624 (N.D. Ill. 1992)

Inasmuch as the facts and claims in the state and federal cases are almost identical, it is apparent that the two cases could have been tried together. See *Ocean Insurance Co. v. Fields*, 18 F.Cas. 532 (C.D.D. Mass. 1841) (No. 10, 406). Therefore, based on the foregoing, the Court hereby

ORDERS that the Motion to Dismiss is GRANTED and the request for Sanctions is DENIED. It is further ORDERED that the complaint against BMI is DISMISSED. All relief not specifically granted herein is DENIED

SIGNED at Houston, Texas, on this 29 day of July, 1994.

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DAVID HITTNER

United States District Judge.

THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA) ex rel. DILIP KUMAR PAUL,	)	CIVIL ACTION
Plaintiff,	)	No. H-92-2429
v.	)	
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. and PB-KBB,	)	
Defendants.	)	

ORDER

Defendants' Motion for Protective Order (Docket Entry #33) is GRANTED.

Plaintiff's Motion to Compel Discovery (Docket Entry #39) is DENIED.

It is ORDERED that Defendants shall respond to Plaintiff's Request for Production of Documents on or before 30 days after the date the Court rules on defendants' Motion to Dismiss.

SIGNED at Houston, Texas, on this 8th day of February, 1994.

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Marcia A. Crone
United States Magistrate Judge